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2000

# Vear Brooks v. Pete Haun : Brief of Appellant

Utah Court of Appeals

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Vear Brooks; pro se.

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# In The Utah Court of Appeals

Vear Brooks  
Vs  
Pete Haun  
Petitioner/Appellant  
Respondent/Appellee

Appellate case No. 20000842

**FILED**

OCT 25 2000

ON APPEAL from the Third District Court  
Salt Lake County, State of Utah  
The Honorable J. Dennis Frederick  
D.C. Case No. 000901758

## COURT OF APPEALS

### Brief of Appellant

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### Argument Priority Classification No 2

The following related and Prior Appeals were  
Case No. 960905986 was filed on Aug. 27, 1996, was denied by minute  
entry Pursuant to 78-35A-166(1) (D) and 78-35A-107(1)

1-year statute of limitations and Successive - the issues were the same  
Case No. 990906312 was filed in May 1999, I never received a final decision  
in this case.

Federal Court D.C. Case No. 98-CV-466-W

Tenth Circuit Court of Appeals Case No. 98-4218

Both cases were dismissed as Procedurally Barred.

None of the above related and Prior appeals were adjudicated fully and fairly.  
None of the issues I have raised have ever been considered or adjudicated  
on their merits but only on Procedure grounds.

I filed an unrelated Petition in 1995, Case No. 950907722, alleging that the  
Board of Pardons had run all my sentences consecutively. That Petition was  
dismissed as frivolous on its face stating that I had not exhausted my  
administrative remedies.

### Statement of the Issues

First Issue: The District Court erred in dismissing my Petition on  
Procedural default, because there was no final decision given me in Case  
no. 990906312 Violating my due Process rights and forcing me to file a  
Successive Petition because there was no other remedy of law.

2<sup>nd</sup> Issue ~~Issue~~: Case No. 950907722 was a Totally unrelated Petition No issues were adjudicated in this case it was dismissed as frivolous on its face

### Statement of the Case:

On October 21, 1994, and Pursuant to a Plea agreement which induced me to Plead guilty to two counts of attempted sexual abuse of a child, each a Third degree felony, in Third District Court of Salt Lake County. My Court-appointed Attorney Lisa Remal, told me that the Prosecutor had agreeded to run my Sentences Concurrently with my Probation Violation of a 2<sup>nd</sup> degree felony sexual abuse of a child if I would Plead guilty. I agreeded to Plead guilty because I believed I was going to go to Prison anyway because of Probation Violation for having unsupervised contact with the two girls. I also thought and believed that having all the Sentences run concurrent they would be treated as one Sentence and conviction with the same amount of incarceration time. I Pled guilty in Court and after my Plea my attorney asked me to Sign a Statement that I had Plead guilty. I quickly scanned the document which was titled Statement of Defendant. My attorney did not read it to me and the only Part of it I read and Signed was Page Six which stated that I was 55 years old and that I was not under the influence of any drugs, medication or intoxicants which would impair my judgment. There was no Plea agreement attached to that document nor was there a Plea agreement attached to the minute entry stating I had Plead guilty to the charges. I Plead guilty on October 21, 1994, and was sentenced 49 days later on Dec. 9, 1994. In that Sentencing Judge Frederick ignored the Plea agreement and ran my two 3<sup>rd</sup> degree Sentences consecutive with my 2<sup>nd</sup> degree conviction in which my Probation had been Violated because of my guilty Plea to the two 3<sup>rd</sup> degree felony charges. I told my attorney I wanted to withdraw my guilty Plea because he had ignored the Plea agreement. She told me I Couldn't. Nor did she advise me that I could appeal that decision or the time limits involved. Nor did Judge Frederick Tell me the elements of the crime I had Plead guilty too or did he tell me at that Sentencing hearing I could appeal that decision. My attorney did not advise me that I would face having my Sentences ran consecutive by Pleading guilty to those charges while on Probation. My attorney did not explain the elements of the crime or the consequences of my guilty Plea. She was only interested in obtaining a Plea agreement and disposing of the case. She spent less than ten minutes with me.

I filed a habeas corpus Petition claiming that;

- (1) my plea was involuntary because I did not understand the nature of the charge and the consequences of the plea.
- (2) I was denied effective assistance of counsel.
- (3) I was not given the opportunity to review and respond to the P.S.I. report prior to sentencing.

### Utah Rules of Criminal Procedure Rule 22 Sentence, Judgment and Commitment

(a) upon entry of a plea or verdict of guilty or plea of no contest, the court shall set a time for imposing sentence which shall be not less than two nor more than 45 days after the verdict or plea, unless the court, with the concurrence of the defendant, otherwise orders. Pending sentence, the court may commit the defendant or may continue or alter bail or recognizance.

"I was sentenced, without my concurrence, 49 days after plea."

(c) upon a verdict or plea of guilty or plea of no contest, the court shall impose sentence and shall enter a judgment of which shall include the plea or the verdict, if any, and the sentence. Following imposition of sentence, the court shall advise the defendant of defendant's right to appeal and the time within which any appeal shall be filed.

"Judge Frederick did not advise me of my right to appeal."

(e) the court may correct an illegal sentence, or a sentence imposed in an illegal manner, at any time.

### Illegal Sentence

A district court may reassume jurisdiction to correct an erroneous and void sentence, irrespective of the time limits.

State v. Lee Him, 79 Utah 68, 72d 825 (1932).

Defendant must first ask the trial court to correct his sentence if he believes that it has been imposed in an illegal manner.

State v. Brooks, 868 P.2d 818 (Utah Ct. App. 1994) aff'd 908 P.2d 856 (Utah 1995)

I filed a motion to correct an illegal sentence which Judge Frederick ignored.

### Utah Rules of Criminal Procedure Rule 11

(e) the court may refuse to accept a plea of guilty, no contest or guilty and mentally ill and may not accept the plea until the court has found:

(2) the plea is voluntarily made

(5) the defendant knows the minimum and maximum sentence

H)(3) if the judge decides that final disposition should not be in conformity with the plea agreement, the judge shall advise the defendant and then call upon the defendant to either affirm or withdraw the plea.

Judge Frederick did not do this as the record shows, nor did he ascertain (2) (5) and (6) before accepting my plea.

#### Appellate Review

Subdivision (e) of this rule permits the court of appeals to consider the legality of a sentence even if the issue is raised for the first time on appeal.

State v. Braks, 908 P.2d 856 (Utah 1995)

#### Compliance With Rule

A trial court's failure to comply strictly with this rule in accepting a guilty or no contest plea is good cause, as a matter of law, for the withdrawal of that plea.

State v. Gibbons, 740 P.2d 1309 (Utah 1987) State v. Smith, 812 P.2d 470 (Utah Ct. App. 1991)

#### Judicial Burden

The law requires the burden of establishing compliance with the requirements for taking a guilty plea by using a written affidavit on the trial judge. It is not sufficient to assume that defense attorneys make sure that their clients fully understand the contents of the affidavit.

State v. Gibbons, 740 P.2d 1309 (Utah 1987)

Strict, and not just substantial, compliance with subdivision (e) is required.

State v. Valencia, 776 P.2d 1332 (Utah Ct. App. 1989)

State v. Pharris, 798 P.2d 772 Utah Ct. App. Cert denied 804 P.2d 1232 (Utah 1990)

This rule places on trial courts the burden of ensuring that constitutional and rule requirements are complied with when a guilty plea is entered. A trial court must personally establish that the defendant's guilty plea is truly knowing and voluntary and establish on the record that the defendant knowingly waived his or her constitutional rights and understood the elements of the crime.

State v. Thurman, 911 P.2d 371 (Utah 1996)

There is no written affidavit from Judge Frederick that petitioner knowingly entered a guilty plea.

#### Claim Preclusion Applies if:

(1) the two suits at issue involve the same parties or their privies;

Case No. 950907722, involved actions and decisions by the Board of Pardons, it did not involve the legality of my sentence or the legality of my commitment.

(2) the claim alleged to have been barred must have been presented in the first suit or must be one that could and should have been raised in the first action. The issues in first suit had nothing in common with issues in second petition.

## Utah Rules of Civil Procedure Rule 65B

### (b) Wrongful Imprisonment.

(1) Scope. Any Person committed by a court to imprisonment in a state prison, other correctional facility or county jail, who asserts that the commitment resulted from a substantial denial of rights may petition the court for relief under this paragraph. This paragraph (b) shall govern proceedings based on claims relating to original commitments and commitments for violation of probation or parole. This paragraph (b) shall not govern proceedings based on claims relating to the terms or conditions of confinement. Petition against the Board of Pardons, Case no. 950907722, related to the terms and conditions of confinement, and was totally unrelated to wrongful imprisonment.

3) The first suit must have resulted in a final judgment on the merits.

Madsen v. Borthick, 769 P.2d 245, 247 (Utah 1988)

No suit or petition, not case no. 950907722, 960905986, 990906312, or Federal cases 98-CV-466-W, 98-4218 have ever been decided on their merits.

The Supreme Court in overturning the one-year statute of limitations in the Larry Julian case, wrote in the court's main opinion, "Proper consideration of meritorious claims raised in a habeas corpus petition will always be in the interests of justice. No consideration has ever been given to the merits of any of my petitions, nor have any of my petitions resulted in a final judgment on the merits. Judge Frederick in case no. 960905986, ignored my motion for evidentiary hearing. He then held a hearing, per minute entry, in which he dismissed my petition pursuant to 78-35A-106(1)(D) and 78-35A-107(1) without my presence. If a hearing is held on a petition for habeas corpus, the petitioner seeking the relief is entitled to be present and thus a court should not proceed in a summary manner to hold a hearing in the absence of the plaintiff and his counsel.

Stinnett v. Turner, 20 Utah 2d 148, 434 P.2d 753 (1967)

I did also file a motion in this current case for an evidentiary hearing, Judge Frederick did also ignore this motion.

Direct or collateral attack on a guilty plea ordinarily requires evidentiary hearing unless the record of a prior hearing shows petitioner is clearly not entitled to relief.

Criminal law 998(3)

Judge Bohling in case no. 990906312, did also ignore and refuse my motion for a evidentiary hearing on merits. Judge Winder in federal court case no. 98-CV-466-W, did also refuse my motion for evidentiary hearing on merits.

**FILED**

OCT 25 2000

COURT OF APPEALS

§ 5B (6)(3)(U) barred only successive proceedings involving identical issues.  
4 conviction or sentence that has not been fully and fairly adjudicated on appeal or in a prior habeas corpus proceeding should not be denied reexamination because of procedural default.

Earl v. Warden Utah State Prison 811 P.2d 180 (Utah 1991)

### Subsequent Proceeding

A showing of good cause that justifies the filing of a successive habeas corpus claim may be established by showing:

(1) the denial of a right pursuant to new law that is, or might be, retroactive:

The Supreme Court ruled the one-year statute of limitations unconstitutional.

(3) the existence of fundamental unfairness in a conviction:

The elements of the crime or the consequence of the guilty plea were not explained to me by my attorney or the sentencing judge.

(4) the illegality of a sentence:

Judge Frederick, the sentencing judge, violated Utah Rules of Criminal Procedure Rules 11 and 22

Judge Frederick erred and improperly accepted my guilty plea

Rule 22 section (a) Judge Frederick did not sentence me in the 2-45 day time limit under this rule.

Rule 22 section (c) Judge Frederick did not advise me of my right to appeal and the time within which any appeal shall be filed. As provided under this rule.

### Facts !

Petitioner, Vear Brooks, has shown good cause for filing a successive claim.  
Petitioner's Plea of guilty was involuntary, and accepted illegally.

Determinative constitutional provisions, statutes, ordinances, rules and citation:

Because guilty Plea is a waiver of trial and unless applicable law otherwise provides, a waiver of right to contest admissibility of any evidence state might have offered against defendant, guilty Plea must be an intelligent act done with sufficient awareness of relevant circumstances and likely consequences.

McMann v. Richardson, N.Y. 1970, 90 S.Ct. 1441, 397 U.S. 759, 25 L. Ed. 2d 763,  
on remand 453 F.2d 745

A Plea of guilty induced by promises unfulfilled will not sustain a conviction

Coney v. Wyrick, C.A. Mo. 1976, 532 F.2d 94

A prerequisite to a valid guilty plea is that it be a voluntary waiver

of right of defendant not to incriminate himself; such a waiver cannot be

voluntary if made by a man unaware of nature of charges he faces and direct

consequences of a guilty plea.

Ware v. Cox, D.C. Va. 1971, 324 F. Supp. 568

When a defendant indicates a desire to enter a guilty plea, the duty of counsel is

limited to ascertaining whether the plea is voluntarily and knowingly made. Whatever

position defendants took with respect to their plea, it was their lawyers duty to render

them ~~advised~~, informed, advise based on his estimate of states case and their own;

a clients professed desire to plead guilty does not end a lawyers job.

Ware v. Cox, D.C. Va. 1971, 324 F. Supp. 568

Adequate preparation and performance by trial counsel are relevant considerations

in connection with petitions for post-conviction relief on ground of ineffective

assistance of counsel.

U.S. ex rel. Owens v. Mack, D.C. Pa. 1974, 383 F. Supp. 1328

Whether counsel is appointed or retained, defendant has right to effective aid,

which may not be satisfied where appointed counsel lacks opportunity to consult

with accused and prepare his defense.

U.S. ex rel. Washington v. Maroney, C.A. Pa. 1970, 428 2d 10

### Fact 1

My attorney gave me no advice whatsoever in connection with my case

other than terms of the plea agreement which induced me to plead

guilty and was in fact unlawful. She also spent less than 10 minute with me.

### Summary of Argument

Petitioner's Petition should not have been treated as successive in cases no's

960905986, and 990906312, because of case no. 950907722, because the

issues raised were unrelated. The Petitioner is not barred in claim

preclusion, because none of my petitions has been fully and fairly adjudicated

nor has any of my petitions resulted in a final judgment on merits. The only issue

the courts and Judges and Justices have considered and addressed is

Procedure grounds and successive Petitions and claim preclusion.

Petitioner has overwhelmingly shown good cause for filing a successive

claim. In the interests of Justice Proper consideration should be given to the

merits of my Petition. Judge's Bohling and Fredanck and his clerk C. Boverly

have used every trick and tactic available to them in Third District Court

to prevent me from bringing my habeas corpus appeal to the Court of Appeals.



## Argument

The district court erred in dismissing my Petition for Procedural Default because of the successive Petition ruling. Petitioner was sentenced in an illegal manner. The Utah Court of Appeals should consider the legality of my sentence and commitment. Petitioner's Plea of guilty was involuntary and accepted in an illegal manner. The Third District Court erred in accepting my Plea of guilty. The Third District Court erred in dismissing my Petition as successive and in absence of that, Petitioner has shown good cause for filing a successive Petition. There is no written affidavit from the sentencing judge establishing compliance with Rule 11(e) as required by law. Strict, and not just substantial, compliance with rule 11 subdivision (e) was not followed. Judge Frederick did not establish Plaintiff knowingly waived his constitutional rights and understood the elements of the crime and the consequences of the Plea. My court-appointed attorney did not give me effective assistance of counsel. Rule 11(b) was violated because the trial court judge did not ask if my Plea was a result of a Plea agreement, and if so, what agreement had been reached. There is not a copy of the Plea agreement on file at trial or sentencing. The sentencing judge violated rule 11(e)(1)(3) when refusing to honor terms of the Plea agreement, he did not call upon defendant to either affirm or withdraw the Plea. The sentencing judge violated rule 11(8) when he did not inform me of my right to appeal. Judge Frederick, the sentencing judge, violated rule 22(a) by not sentencing Plaintiff within the not less than two nor more than 45 days. He violated rule 22(c) when he did not advise me of my right to appeal and the time within which to appeal. Judge Frederick did not allow Plaintiff to review and respond to the P.S.I. report prior to sentencing.

## Conclusion

Petitioner respectfully requests this court to rule that my Petition is not procedurally barred as successive and that Petitioner's Plea of guilty was involuntary, that Petitioner's Plea of guilt was accepted illegally, that Petitioner was sentenced illegally, that this court vacate this illegal sentence and commitment and order Petitioner released from his illegal incarceration.

Near Brooks  
Attorney Pro Se

## Certificate of Service

I do hereby certify that on the 23<sup>rd</sup> day of October, 2000, I sent by first class mail, a true and correct copy of Appellant's Brief to the following:

Annina M. Mitchell  
Assistant Attorney General  
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Salt Lake City, Utah

by Neve Brooks